IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATIONS No 1302 & 1309 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE N.N.MATHUR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

2. To be referred to the Reporter or not? Yes

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3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

I B VYAS P,I.

Versus

STATE OF GUJARAT

Appearance:

Special Cri.Application No.1302/97

M/S THAKKAR ASSOC. for Petitioner

Mr S N Shelat, Addl.Advocate General for the State of Gujarat

Mr K S Rathore with Mr V M Joshi for the State of Rajasthan

MR Kela for Respondent No. 2

Special Cri. Application No.1309/97

Mr D N Patel, APP for the State of Gujarat

Mr K S Rathore with Mr V M Joshi for State of Rajasthan

Mr Kela for respondent No.1

CORAM : MR.JUSTICE N.N.MATHUR

Date of decision: 04/12/1997

JUDGMENT (COMMON)

Two Criminal Misc.Applications being No.6163 and 6164 of 1997 have been filed by the respondent Mohanlal, P.I., police station Kotwali, Pali, Rajasthan under Article 226 (3) of the Constitution of India with a prayer to vacate the ex-parte stay order dated 29.9.1997 whereby the further investigation in FIR Case No.403/96 registered at Kotwali, Pali police station, State of Rajasthan has been stayed. This Court directed to hear these applications as well as the main Special Criminal Applications together. Thus, the main petitions are taken up for final hearing.

2. Special Criminal Application No.1302/97 has been filed by the Shri I B Vyas, P.I. Local Crime Branch (LCB), Palanpur, Mehsana and at present P.I., Civil Defence Office, Kothi Kacheri, Vadodara, seeking following directions:

"[A] Your Lordships be pleased to issue appropriate writ, direction or order to transfer the criminal proceedings of FIR Case No.403/96 from Pali Kotwali police station for investigation and trial with C.R. No.216/96 at Palanpur in the interest of justice".

Special Criminal Application No.1309/97 has been filed by the State of Gujarat, seeking the following directions:

"[A] Your Lordships may be pleased to issue a writ of mandamous or a writ of any other appropriate nature, order or direction, transferring the criminal proceedings of FIR Case No.403/96 from Pali Kotwali police station for investigation and trial with C.R.No.216/96 registered at Palanpur City police station."

POINT OF CONTROVERSY

3. The point involved in these petitions pertains to applicability of section 186 of the Criminal Procedure Code, 1973 (for short, 'the Code') in the facts of the case. On scrutiny of both the petitions and section 186 of the Code, it is painfully observed that the State of Gujarat has chosen to approach this Court in its

extra-ordinary jurisdiction under Article 226 of the Constitution of India by way of wholly misconceived petitions perhaps only with a view to protect some of the officers against whom there are serious allegations constituting offence under various IPC provisions and NDPS Act. We have burnt our fingers by granting an ex-parte stay order bringing the investigation at an advanced stage to complete halt. Having examined the matter in depth and detail, prima facie, it appears that there was a deep rooted conspiracy for achieving unlawful object. The learned Advocates appearing for the petitioners have not been able to point out if any enquiry or trial is pending in any Court in the State of Gujarat with respect to same offence of F.I.R. case.No.403/96 of Kotwali police station. Section 186 of the Code is concerned itself only to a situation when two or more Courts have taken cognizance of the same offence. The prayer in both these petitions is to transfer the criminal proceedings of C.R. No.403/96 from Kotwali police station, Pali for investigation and trial with C.R. No.216/96 registered at Palanpur City police station. The investigation and trial are two different stages and they do not go together except in certain situations such as further investigation under section 173 (8) of the Code, which is not the case of the petitioners. Be that as it may, there is no prayer for transfer of any enquiry or trial from any Court of Rajasthan to a Court in the State of Gujarat. The prayer is for transfer of criminal proceedings in FIR Case No.403/96 for the purpose of investigation. Therefore, both the petitions are liable to be dismissed on the very ground that the prayer sought are not covered within the ambit of section 186 of the Code.

4. However, since number of contentions have been raised and the facts in detail have been stated by the respective parties, I consider it appropriate to state the facts and deal with the contentions.

CONENTIONS

(i) In Special Criminal Application No.1309/97 filed by the State of Gujarat, Mr D N Patel, learned APP contended that the Investigating Officer in C.R. No.216/96 has added section 58(2) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, 'NDPS Act') and investigation in that regard is still in progress, and therefore, the investigation in FIR case No.403/96 of Kotwali police station, Pali for the same offence should be stayed as there cannot be investigation

of same offence by two different agencies. It is further submitted that while discharging accused-Sumersingh Rajpurohit on a report filed by the Gujarat Police under section 169 of the Code, the learned Special Judge has applied his mind and that act falls within the purview of enquiry as defined under section 2(g) of the Code. Thus, in view of section 186 (b) of the Code, the complaint filed before the Court of Chief Judicial Magistrate, Pali, be transferred to Palanpur police station.

(ii) Mr P M Thakkar, learned Sr.Advocate in Special Criminal Application No.1302/97 appearing for the petitioner Mr I B Vyas, submitted that the investigation of offence under section 58(2) of the NDPS Act is consequence of the final report under section 169 of the Code itself. He further submitted that the Special Judge, Palanpur has taken the cognizance of the offence, which is evident from the fact that the accused Sumersingh was discharged under section 227 of the Code. He has referred to decisions of the Apex Court, reported in AIR 1967 SC 1167 and Full Bench decision of this Court, reported in 7 GLR 130. He has relied upon the decision reported in 1979 Cr.L.J. 226.

(iii) Shri S N Shelat, learned Addl.Advocate General appearing for the respondent-State of Gujarat in Special Criminal Application No.1302/97, advancing the contention raised by Mr D N Patel, learned APP in Special Criminal Application No.1309/97, submitted that it is well settled position of law that cognizance is taken of an offence and not of an offender. The word 'cognizance' has not been defined in the Code, but as soon as the Magistrate applied his judicial mind to the offence stated in the complaint or the police report, the cognizance is said to have been taken. He placed reliance on decisions of the Apex Court reported in AIR 1996 SC 204 and AIR 1983 SC 439. He also relied on a case reported in 1982 Cri.L.J. 1264. It is submitted that while disposing the report under section 169 of the Code, the learned Special Judge has applied his judicial mind, and therefore, he deemed to have taken cognizance of the offence under section 58(2). He further submitted that taking cognizance of an offence does not mean taking cognizance of specific penal provisions, but taking cognizance of the allegations constituting the offence. He also submitted that the same offence or the same accused persons are not relevant considerations for attracting the provisions of section 186 of the Code. It is thus, submitted that provisions of section 186 are attracted in the present case and as the filing of the case in the Court of Special Judge in the State of Gujarat is prior in time. Thus, the case

pending in the State of Rajasthan should be transferred to the State of Gujarat in accordance with the provisions of section 186 of the Code.

(iv) Mr V M Joshi, learned advocate appearing for the State of Rajasthan submits that in C.R. No.216/96 of Kotwali police station, no question of taking cognizance arises as police submitted report under section 169 of the code and the learned Special Judge by order dated 14.5.1996 while accepting the final report, discharged the bail bonds taken on 8.5.1996. It is submitted that there is no question of discharging the accused Sumersingh as no case was found against him and the learned Special Judge only passed the order of discharging the bail bonds. He further submitted that the transfer of investigation is beyond the scope of section 186 of the Code, and therefore, the present petition is wholly misconceived. He placed reliance on cases reported in 1978 Cr.L.J. 1475, 1983 (2) Crimes 416, 1984 Cr.L.J. 1065 and 1991 (2) RLR 310.

(v) Mr Kela, learned Advocate appearing for Sumersingh submitted that the present petition is an exhibit of gross abuse of extra-ordinary jurisdiction of the High Court under Article 226 of the constitution of India. He submitted that on a plain reading of section 186 would show that by no stretch of imagination, the provision can be attracted to the facts of the present case. He also submitted that the investigation under section 58 (2) at Palanpur is being investigated by none else but by the persons who are accused in C.R. No.403/96. He also submitted that the case under section 58 (2) of the NDPS Act may at the most be a defence of accused in F.I.R. Case No.403/96 Palanpur which shall be considered during the trial pending in the Court of Special Judge at Jodhpur at an appropriate stage.

5. Before I proceed to deal with each contentions, it is necessary to narrate the facts pertaining to FIR Case No.403/96 and C.R. No.216/96 to which the learned Advocates for the respective parties have taken me through in great detail and raised various contentions on that basis.

C.R. No.216/96 of Palanpur police Station, State of Gujarat for offence under section 17 of the NDPS Act.

6. The aforesaid C.R. case has been registered on a telephonic message on 30.4.1996 from police control room, Palanpur which contains the message that one unknown person from Pali (Rajasthan) has given information that

one Sumersingh C Rajpurohit deals in opium. He is staying in Hotel Lajwanti at Palanpur along with the opium weighing 5 kgs., delivery of the opium is to be given in Palanpur. On receiving this information, the police visited Hotel Lajwanti at Palanpur. Thereupon the hotel owner verified the entries of the register regarding the person holding the guest house. It was disclosed that as per entry no.604 of the register, one Sumersingh Rajpurohit, resident of Vardhman Market, Pali had check in room No.305 at 21.40 hours on 29.4.1996. The said room was given to him by his father Shantilal. Thereafter the police team went to room No.305 and opened the same. No person was found therein. It was learnt that on receiving the information about the raid, the occupant of the room had run away. Thereafter, search of the room was made in presence of Panchas. They found opium weighing 1 kg. 15 grms. The P.I. Mr Vyas, under the instructions of Mr Sanjiv Bhatt, D.S.P., Palanpur went to Pali along with P.S.I., Rajendra Yagnik and other police constables. The accused Sumersingh was arrested in the intervening night of 2.5.1996 and 3.5.1996 from his house at Pali and brought to Palanpur. As per the information, he had come to Palanpur with 5 Kgs. of opium and 1 kg. 15 grms. was recovered from room No.305 of Hotel Lajwanti. Further information was to be collected from the accused as to where he sold the remaining 4 kgs. of opium. Sumersingh was produced before the learned Chief Judicial Magistrate, Palanpur on 4.5.1996 and prayed for grant of remand for 14 days. When Sumersingh was produced before the Chief Judicial Magistrate, the learned Advocate on behalf of Sumersingh, submitted that the accused is an Advocate practising at Pali in the State of Rajasthan and he has been falsely arrested at the instance of the owner of the shop which is in the possession of Sumersingh. It was also pointed out that a Civil Suit is going on between the owner of the shop and Sumersingh. It was also pointed out that the police is in collusion with the owner of the shop. However, the learned Magistrate granted remand for a period of seven days and directed that the accused shall be produced at 15.30 hours on 10.5.1996 before the Special Judge. 5th May was a holiday and on 6th an identification parade was arranged before the Executive Magistrate, Palanpur at 16.30 hours. Sumersingh was not identified. The witnesses stated that the accused is not the person who check in room No.305 on 29th April, 1996. They had not seen the arrested person-Sumersingh earlier. In view of this, on the same day, police submitted a report before the Special Judge, Palanpur under section 169 of the Code and prayed that Sumersingh be released. Mr R P Vaghela, Addl.Sessions Judge did not pass any

order thereon on 6th May, 1996. On the same day, the accused also filed an application for bail under section 439 of the Code. The learned Addl.Sessions Judge enlarged Sumersingh on executing a personal bond of Rs.10,000/- by order dated 8.5.1996. The order reads as follows:

"Heard, Mr Parmar for the applicant and P.P. Mr Jagani.

Since even according to the police, the applicant does not appear to be involved in any offence, it is just and proper to release him on bail.

The applicant be released on bail on furnishing personal bond in the sum of Rs.10,000/- and undertaking that he will remain present in the Court when summoned.

Sd/- R P Vaghela
Addl.Sessions Judge"

On 9th May, 1996, Mr I B Vyas, Police Inspector, LCB, Palanpur submitted an application to the Special Judge stating that during the course of investigation in C.R. No.216/96, it is emerged that there is some conspiracy in giving the information with respect to staying in room No.305 of the Guest House and entering the name of Sumersingh in the register. He also stated that the signature of Sumersingh has been forged. In view of this, a request was made to permit him to add section 58 (2) of the NDPS Act in the FIR. The learned Magistrate did not pass any order thereon. On 14th May, 1996, Mr J R Vora, Special Judge, passed the order on the police report filed under section 169 of the Code on 6.5.1996. The learned Judge cancelled the bail bonds executed by Sumersingh in pursuance of the order dated 8.5.1996. The order dated 14.5.1996 reads as follows:

"Learned PP Mr Jagani and learned Advocate B S Parmar for the accused were heard. Papers of investigation perused. Learned PP has contended that the evidence is deficient to connect the accused with the fact that he boarded in Hotel Lajwanti. Further evidence shows that the accused, at the relevant time, was at Pali, Rajasthan, and therefore, the report under section 169 of the Code is required to be accepted. He is released on personal bond by Addl.Sessions Judge, vide order dated 8.5.1996 below Criminal Misc. Application No.331/96. Hence in the interest of justice, following order

is passed:

O R D E R

Report of the Investigating Officer under section 169 of the Code pursuant to the accused is accepted. The accused is released and discharged. Personal bond executed by the accused in pursuance of the order dated 8.5.1996 stands cancelled.

Pronounced in the open Court on 14.5.1996

Sd/- J R Vora
Special Judge"

7. I have perused the police diary of C.R. No.216/96. Nothing substantial has been done in this case. Mr D N Patel, learned APP submitted that the police is in search of the person who gave false information to the police from Pali. For this two computer photographs have been prepared. I cannot understand when even according to the police the said information was received on telephone how and what basis a computer photograph could be prepared. There is no progress beyond this, in this case.

FIR Case No.403/96 of Kotwali police station, Pali for offence under sections 120-B, 195, 196, 342, 347, 357, 369, 458, 482 IPC and sections 17, 58 (1_ and 58(2) of NDPS Act dated 18.11.1996

8. On 17.10.1996, Sumersingh Rajpurohit submitted a complaint in the Court of Chief Judicial Magistrate, Pali, Rajasthan. He also produced an envelope containing two audio cassettes along with a schedule. In the said complaint, following persons have been arrayed as accused persons:

1. Phootarmal , resident of Bijapur, Pali
2. Raman R Jain, Addl.Judge, Gujarat High Court, Ahmedabad.
3. Sanjiv Bhatt, District Superintendent of Police, Rajkot, Gujarat
4. I B Vyas, Police Inspector, LCB, Palanpur
5. Yagnik, Traffic Inspector, Palanpur
6. Shantilal, owner of Hotel Lajwanti, Palanpur
7. Pradeepbhai, LCB, Palanpur
8. Hingerbhai, LCB, Palanpur
9. Kantibhai, Constable cum driver, Palanpur

There are seven to eight other unknown police officers of Gujarat also included as accused persons.

After following the requisite procedure, the learned Magistrate forwarded the complaint for investigation under section 156 (3) of the Code to Kotwali police station, Pali. However, the case was not registered by the police as officer incharge of the police station had hesitation in registering a case against Mr R R Jain, Judge of the High Court of Gujarat who was shown as accused No.2. A revision was filed by the State of Rajasthan against the order of Chief Judicial Magistrate dated 17.10.1996, so far as it relates to registering the case against Mr R R Jain is concerned. Reliance was placed on the case of K Veeraswamy vs. Union of India, reported in Criminal Law Reporter SC 1991 p.67. After discussing the case of the Supreme Court in Veeraswamy's case, the learned Addl.Sessions Judge in his judgment dated 15.11.1996, held thus

> "In my opinion, for registering an offence against Mr R R Jain, Judge of the High Court of Gujarat, consultation of Chief Justice of India is not required."

The learned Judge, however, modified the order of the learned Magistrate so far as the direction of investigation to be conducted by the DGP is concerned. The learned Judge directed that the case shall be investigated by the P.I., Police Station, Pali. After decision in the Revision, the police registered the case as FIR Case No.403/96 dated 18.11.1996.

The facts of FIR Case No.403/96 of Kotwali police station, Pali as culled out from the complaint and other materials on record are as follows:

Accused No.1-Phootarmal is a permanent resident of Bijapur District, Pali. He has business in Shivganj and Pali. He is the real uncle of Mr R R Jain, a Judge of the High Court of Gujarat at the relevant time. Mr Jain is also a permanent resident of Bijapur. The engagement of Mr R R Jain's real sister Muli Devi had taken place with one Mr Javant Raj Jain of Bijapur, but before the marriage could take place, Muli Devi died. Mr Jawantraj married to Smt. Amribai alias Anita Jain. As per the caste and village customs, as Amribai married in place of Muli Devi, she was being treated by Mr R R Jain and other family members as real sister. A shop bearing No.6 situated at Vardhaman Market belongs to Amribai. As she resides at Bombay, a Power of Attorney has been given

to Phootarmal. Narsinh, brother of the complainant Sumersingh carried on business in the said shop with Manoharlal Jain. The office of Sumersingh as Advocate also existed in the said shop. There was a dispute between Phootarmal and the tenants for vacating the shop. A Civil Suit was also pending. It is alleged that the accused persons have conspired to get the shop vacated and to fulfil this systematically planned a conspiracy, they arranged to file C.R. No.216/96 on 30.4.1996 under the NDPS Act at Palanpur against the complainant in which it was mentioned that Sumersingh stayed in room No.305 at Hotel Lajwanti, Palanpur on 29.4.1996 and opium was recovered from the said room. In the intervening night of 2nd and 3rd May, 1996, the Gujarat police personnel M/s I B Vyas, P.I. and Yagnik, PSI along with other police officers came to Sumersingh's house at about 1.30 a.m. (midnight). They called "Vakil saheb, Vakil saheb". On opening the door, they pounced on him. He was hand-cuffed and thrown in the jeep. He was manhandled. He was not even allowed to put on his shirt. They took him in baniyan and trousers. Family members gave information to his brother and fellow Lawyers, who in turn informed the Pali police about the incident. A wireless message was given to Shri Gomaram, PSI who was on patrolling duty. Mr I B Vyas, with a view to return Palanpur, just proceeded towards the Highway. Mr Gomaram, P.S.I., Kotwali police station who was on patrolling duty, intercepted the vehicle of the Palanpur police. Gomaram took them to the Pali Kotwali police station. At the police station, many Lawyers had assembled. Mr I B Vyas disclosed his identity as Police Inspector, LCB, Palanpur, Gujarat Police. All the police personnels were in civil dress. They could not produce the police diary. Police Inspector Kotwali Pali told Mr I B Vyas that even if they wanted to arrest Sumersingh in NDPS case before entering in Pali, they should have informed Rajasthan police. He also asked Mr I B Vyas to remove the hand-cuff from the hands of Sumersingh. Police at Pali advised Mr Vyas that they should take Sumersingh only in the morning after the entire matter is sorted out. Mr Vyas said that he should talk to Mr Sanjiv Bhatt, DSP at Palanpur. Mr Sanjiv Bhatt was contacted by the P.I. Mr Sanjiv Bhatt insisted that as there is elections, on 7th May, the police party along with Sumersingh should immediately be allowed to move. Mr I B Vyas gave a written Taharir (memo) stating that he has arrested Sumersingh in connection with C.R. No.216/96 under NDPS Act. An entry was also made in the Rojnama at police station Kotwali, Pali, narrating the entire incident. Mr Sumersingh has stated that Mr I B Vyas enquired from him about Vardhaman market and shop

No.6. The jeep was also taken on that side. He showed him shop No.6. On reaching at Palanpur, he was produced before Mr Sanjiv Bhatt, DSP, Palanpur. He enquired from him as to what is the dispute about the shop in Vardhaman market. He asked him to vacate the same immediately otherwise he will have to initiate the proceedings of recovery of the remaining 4 kgs. of opium. He also said that once the recovery of 4 kgs. opium is made from him, it will be difficult for him to get bail even from the High Court. He also stated that the owner of the said shop is brother of Shri R R Jain, a Judge of the Gujarat High Court, who is also interested in getting the shop vacated. Sumersingh passed on this information to Narsingh Rajpurohit, who in turn contacted Raghunathsingh, the elder brother of Sumersingh and directed him to contact Phootarmal Jain. Accordingly negotiation talks commenced with Phootarmal. Narayan Singh of Kharabera played the role of mediator. Phootarmal asked him to give the vacant possession of the shop and also duly execute agreement in writing be given by Mohanlal, the original tenant, only then Sumersingh would be released. After negotiation, the agreement was signed between Phootarmal and Mohanlal on 5th May, 1996. As per the agreement, key of the vacant possession of the shop was handed over in trust to Narayan Singh of Kharabera. With this understanding that when Sumersingh would be released and the case against him would be disposed of, key of the said shop would be given to Phootarmal, otherwise, the same shall be returned to Mohanlal. After this negotiation on the evening of 5.5.1996, all these persons including Phootarmal reached Palanpur. Meanwhile, Phootarmal made a telephonic talk to his nephew Mr R R Jain to Ahmedabad from Pali, apprising him the developments that had taken place in Pali and Mr R R Jain, on his part, talked to Mr Sanjiv Bhatt, DSP, Palanpur. Mr R R Jain instructed Phootarmal that agreement should be in writing duly signed by Mohanlal, the original tenant. There were many rounds of telephonic talks held between Pali and Ahmedabad by Phootarmal and from Ahmedabad to Palanpur by Mr R R Jain in connection with Sumersingh's case. After reaching Palanpur, Phootarmal again held telephonic talk with Mr R R Jain and requested him to ask Mr Sanjiv Bhatt to close the case against Sumersingh at the earliest possible hour, as Sumersingh and his brother has agreed in writing to vacate the shop. The Lawyers and family members had reason to believe from the saying and conduct of Phootarmal that things have been done under the influence of Mr R R Jain. Thus, to collect the evidence, the talk between Phootarmal and R R Jain were recorded on tape. Raghunath Singh also talked to Mr R R Jain from STD

booth, who was assured that Sumersingh will be released and a report under section 169 of the Code was submitted. A report under section 169 of the Code was submitted on 6.5.96 itself. A bail application was also filed on the same day. However, no order was passed by Mr R P Vaghela, the Addl.Sessions Judge either on report under section 169 or on the bail application on the ground that the case being under NDPS Act, such an order can be passed only by the Special Judge. On this, Sumersingh become uncomfortable. Thus, there were again telephonic talks with Mr R R Jain. Sumersingh was assured that whether the Special Judge is there or not, he will be released on 6.5.97. Courts were closed on 7th May on account of elections. On 8th May, Mr Vaghela, Addl.Sessions Judge released Sumersingh on personal bond. It was however, insisted by Gangasingh, advocate that unless Sumersingh is discharged and Final Report is given in the case, the key of the shop shall not be given. On 14.5.1996, final report was accepted by the Special Judge and the personal bonds furnished by Sumersingh were discharged. On 15.5.1996, Gangasingh, Advocate talked through conference system from the residence of Sonalal Nahar to Mr R R Jain. The order accepting the Final Report under Section 169 of the Code and the order of discharge was read over to Gangasingh, on telephone by Mr R R Jain. A direction was given to Gangasingh by Mr R R Jain that as per the agreement, the keys of the shop should be given to Phootarmal. Accordingly, the keys were given to Phootarmal on 15.5.1996. According to the complainant, the conspiracy was hatched at village Mohrai. When Phootarmal, Mr R R Jain, the Sister Amribai, her husband Javant Raj, all had assembled to attend the marriage of the son of Amribai.

INVESTIGATION - C.I.D. CB, RAJASTHAN.

9. By order dated 28.11.1996, the Additional Director General of Police, Rajasthan handed over the investigation to CID, C.B. Rajasthan. The investigation is being conducted by Shri Kalyanmal, IPS and his team. It appears from the report that the investigating party visited Jaipur, Bali, Pali, Bijapur, Palanpur, Ahmedabad, Bhuj, Shivganj, Udaipur, Bombay and collected documents and recorded statements of many witnesses. The entire case has been investigated and a charge sheet has been filed. Phootarmal was arrested on 6.12.1996. His bail application has been rejected by the High Court as well as the Supreme Court. The accused Shantilal has been enlarged on anticipatory bail. Further investigation under section 173 (8) of the Code is at an advanced stage, which is evident from documentary and oral

evidence collected till now.

(i) Shop No.6 in Vardhman Market, Pali, belongs to Amribai. She lives in Bombay. Phootarmal holds the Power of Attorney. He is real uncle of Shri R.R.Jain. They were interested in eviction of the premises from Sumersingh and his brother.

(ii) Though Amribai is not the real sister of Mr R R Jain, as she married to Javant Raj in place of his sister, she was treated as real sister. She is an elderly lady aged 55 years. Her husband-Jawantraj is carrying own business in Bombay. Mr Jain has studied in Bombay staying with his sister Amribai. In one of the reception in the village, Mr R R Jain said that whatever he is today, is because of Javant Raj.

(iii) Smt. Amribai, Javant Raj ji, Phootarmal and R R Jain all had assembled in village Mohrai to attend the marriage of the son of Amribai, during the period 25.4.1996 to 29.4.1996. The investigation has recorded statement of number of witnesses about the participation of these persons in the marriage. As per the information given by the Gujarat High Court, Hon'ble Justice R R Jain was not on duty during the period 25.4.1996 to 29.4.1996. As per the report of the driver, Mr Jain left Ahmedabad on 25.4.1996. Police has also collected copies of the petrol consumption bills which indicate that petrol was filled in his official car GJ-1 G 1904 at Sirohi Road, Sumerpur, Abu Road. Statement of Addl.Superintendent of Police Officers at Bali have been recorded, which shows Shri Jain's presence in Bijapur and near villages during the said period, as on his telephonic request, Police arrangements were made.

(iv) There are statement of witnesses to the effect that during marriage, there were talks in the family about the shop in Vardhaman Market. Shri Javant Raj had agreed to sell the shop for Rs. 6 lakhs, but the deal could not be settled as Phootarmal was demanding Rs. 8 lakhs. Vacant possession of the shop was felt necessary. They disbursed on 29th April, 96. Palanpur is on the way from Bijapur to Ahmedabad.

(v) The Investigating Agency has also collected telephone bills of Phootermal from Pali,

telephone bills of Sanjiv Bhatt, DSP, Palanpur (57104) and that also the telephone bills of Shri R.R.Jain (7865568) at Ahmedabad. Police has collected all relevant record from S.T.D Telephone Booths at Palanpur and Pali. Relevant evidence in that regard has been recorded. There are out-going calls from the telephone of Sanjiv Bhatt to Shri R R Jain at Ahmedabad on various dates i.e. 5.3.1996, 6.3.96, 22.6.96, 24.3.96, 2.4.96. 8.4.96, 9.4.96, 10.4.96, 14.4.96, 4.5.96 and 7.5.96. Similarly there are out-going calls from the telephone of Shri R R Jain to Sanjiv Bhatt at Palanpur on 5.3.96, 31.3.96 and 10.4.96, 30.4.96, 4.5.96, 6.5.96 and 8.5.96.

(vi) On 30.4.96, before the arrest of Sumersingh and the day on which opium alleged to have been planted in the Hotel at Palanpur, there are telephone calls between the alleged conspirators. There are noticeable out-going calls from the official telephone No. 7865568 of Shri R R Jain.

Hrs.	Seconds	
20.23	206	Phootarmal, Pali
21.08	89	-do-
21.17	145	Sanjiv Bhatt Palanpur
21.13	105	Phootarmal, Pali

(vii) On 3.5.96, the day on which Sumersingh was brought to Palanpur, there is one call to Phootarmal at 21.12 hrs., on 4.5.96 again there are out-going calls from the telephone of R R Jain to Phootarmal at 09.11 hours then at 9.20 hours. This talk to Phootarmal is a long one. Thereafter there is a talk to Sanjiv Bhatt at 9.43 hours. Again call to Phootarmal at 9.45 hours, 14.05 hours to Phootarmal 21.09 hours to Phootarmal and immediately thereafter at 21.11 hours, to Sanjiv Bhatt. On 5.5.1996, the day on which agreement to vacate the premises is executed and Sumersingh was assured that he will be released, there are out-going calls from the telephone of Shri Jain to Sanjiv Bhatt at 10.08 hrs., 0.53 hrs., 18.16 hrs. and 23.09 hrs. Suffice it to say that the computer record collected by the Police from telephone Department shows that there had been 16 rounds of telephonic

calls from Pali to Ahmedabad made by Phootarmal to Shri Jain and Ahmedabad to Palanpur made from the telephone of Shri Jain to the telephone of Shri Bhatt. Police has collected tape recorded talk of Phootarmal to the telephone of Shri Jain.

(viii) Investigating Agency has collected various documents pertaining to tenancy of the shop, Civil Suit and the agreement dated 5.5.96 signed by Mohanlal to deliver the vacant possession and another agreement written by Phootarmal through his son Rohit, in which it is mentioned to get Sumersingh released and if it is not done, he will have right to get possession back of the shop and the agreement shall stand cancelled. Key of the shop was given to Narayansingh, mediator.

(ix) Official record showing the visit of IB Vyas and Police party to Pali in civil dress, without informing the local police in jeep of fake number plate has been collected. Relevant record from RTO, Udaipur has been collected about the use of jeep with fake number plate by Mr. I.B Vyas. Statements of number of witnesses have been recorded.

(x) Police has also collected copies of the judicial proceedings of the Court of Chief Judicial Magistrate, Additional Sessions Judge and Special Judge at Palanpur during the period 4.5.96 to 14.5.96, which reflects pressure on police and may be to some extent on judiciary.

(xi) Police has collected documentary and oral evidence to show that Sumersingh was in Pali on 29th and 30th April 1996. Material has also been collected as to how Shanti Lal made a false entry in the Register of Lajwanti Guest House and forged the signature of Sumersingh.

(xii) On 26.11.96, Mr M D Vaishnav, produced an application of Shri R R Jain addressed to the Bar Association for compromise. On 27.11.96, Mr Vaishnav, Pathanjali Joshi, Bhagirath, Advocates talked to Shri Jain. The talk was taped by Sidheswar Puri from another room. The audio cassette has been produced and the same is with the Investigating Agency. According to the complainant, it contains extra judicial confession of Shri R R Jain.

(xiii) Investigating Officer has interrogated almost all the accused persons except one. Mr Sanjiv Bhatt appears to be cooperative with the Investigating Agency. He has appeared before the Investigating Officer and has also answered the questionnaire sent to him. According to him, he only once met Mr Jain in the year 1995 at Patan. With respect to the telephonic calls in the month of March and April, 96, he has stated that since his wife is also a Jain, there might be talks with Mrs R R Jain and his wife. He has also stated that Mr Jain telephoned him on 4.5.96 and told him that Sumersingh is a good man as such he should be released. He has also instructed that he should keep him informed about the case. He however, did not consider it necessary to do so. Mr Jain again telephoned on 5.5.96 and asked him to take steps to release Sumersingh. Mr Bhatt also expressed his grievance that he gave copy of the statement recorded under section 161 of the Code to Mr R R Jain bonafidely but without his consent he passed it over to the accused-Phootarmal who utilised the same for his bail. According to Mr Bhatt, Mr Jain for his selfish-end, concealing the facts that he is giving copy of the statement to the accused-Phootarmal, obtained the copy from him. He has also stated that Mr Jain gave him copy of the reply submitted by him to the Chief Justice of India and the Human Rights Commission. According to Mr Bhatt, Sumersingh has been falsely implicated in the NDPS case and there must be some conspiracy but he is not aware of that. According to him, the conspirators must be the persons who are benefitted by the eviction of the shop No.6 in Vardhaman Market, Pali. He has also stated that Phootarmal and Amribai supposed to be persons directly benefitted and R R Jain is the person indirectly benefitted.

(xiv) The statement of Shri R R Jain has yet not been recorded. When the Additional Superintendent of Police approached him, he told him that he has already referred the Veeraswamy's case and further he has submitted the reply to the Chief Justice of India. He has also asked the officer that Sumersingh, being an Advocate of Amribai, has acted against her interest, and therefore, police ought to have filed a complaint against him for misconduct in the Bar Council. Similarly, one more Advocate, named by him has

also acted against the interest of his client and therefore, a complaint ought to have been filed to the Bar Council against the said Lawyer for professional misconduct. He also questioned the Investigating Officer how they are considering the possession of Sumersingh when both the parties had agreed possession of Mohanlal in the Court? He also directed the Police Officer to examine the case in the light of statement of Mr Sanjiv Bhatt. About the Power of Attorney and writings of Phootarmal, he said that they are not original documents and the police should see from its reliability aspect. With respect to the telephonic talks, he has stated that he has a big family and anybody may talk to him from anywhere.

(xv) Police has also recorded the statement of Amribai and others and has collected material from Bombay.

PETITIONERS CASE;

10. The say of the petitioners in both the petitions is that the police party went to Pali on the basis of the information received by the District Control Room, Palanpur. Sumersingh was interrogated on 3.5.96. They tried to find out further information from him as to the purchase, possession and intended delivery of the opium being recovered. When the police applied for remand, a reply was submitted by Sumersingh stating that he has been falsely implicated and in fact he neither visited hotel Lajwanti nor he brought 1.5 kg. of opium. He also stated that with a view to get the shop vacated, the landlord might have given false information to the police. From the statement of Sumersingh, it reveals that one Phootarmal was interested in getting the shop vacated. Sumersingh was put to identification, but he could not be identified by the hotel persons, and therefore, report under section 169 of the Code was submitted to the Special Judge, Palanpur. After Sumersingh was not identified, the police felt that somebody has given them false information wilfully and maliciously which caused arrest of Sumersingh and therefore, an application was submitted before the Court of Chief Judicial Magistrate to permit them to add section 58 (2) of NDPS Act in the FIR. Thus, the police is investigating the case for offence under section 58(2) of the NDPS Act. The case before the Rajasthan police being FIR Case. No.403/96 is also the same. Since the FIR lodged in Palanpur is first in time, they must be

permitted to investigate the case.

REPLY

11. A reply has been filed by Mohanlal, Police Inspector as well as Sumersingh. According to the respondent, the crux of the matter is shop No.6 situated at Vardhman Market, Pali, belonging to Amribai, the sister of R R Jain of which Phootarmal is the Power of Attorney Holder. It is a case of deep rooted conspiracy wherein a false case has been concocted under the NDPS Act implicating the complainant to hand over the vacant possession of the shop. Phootarmal with the active abatement of the alleged conspirator in prosecution of common design and object of the conspiracy, got a false case being C.R. No.216/96 registered at Palanpur police station against the complainant in serious offence of NDPS Act. It is a known fact that the bail of an accused in a case under NDPS Act is almost impossible. A Senior police officer of the State of Gujarat and a Judge holding a high Constitutional office are the alleged co-conspirators. Thus, the continuing of investigation of CR No.216/96 is nothing but a farce and it has been utilised only as a protecting umbrella to the accused persons in FIR Case No.403/96 registered at Pali.

CONCLUSIONS OF INVESTIGATION

12. Thus, it is evident that both the State Governments i.e. the State of Rajasthan and the State of Gujarat are claiming investigation in the same matter. With a view to scrutinise the bonafides of the respective claimants, I have perused the police diary of C.R. Case No.216/96, police station Palanpur and FIR Case No.403/96, police station Kotwali, Pali. I have given details of investigation in both the cases in the preceeding paragraphs to the extent necessary. While investigation in FIR Case No.403/96 there are certain minimum undisputed facts namely; that Phootarmal, is the Power of Attorney holder of Amribai, the shop No.6 in Vardhaman market was lastly in occupation of Mohanlal, Narsingh and Sumersingh, a Civil Suit was instituted seeking permanent injunction against sub-letting, Sumersingh did not visit Palanpur on 29th or 30th April 96 when his presence is shown in room No.305 of Lajwanti hotel, I B Vyas and his associates visited Pali in civil dress with fake number plate of Gypsy jeep without informing Rajasthan police under the pretext on an anonymous telephone call, recovery of 1.5 kg. opium in absence of the occupant from an unlocked room, after the

threat given by Sanjiv Bhatt with reference to R R Jain on 3.5.96, entering into compromise to vacate premises by way of written agreement, extra ordinary interest of the police in raiding, search and recovery of opium etc. at the time just after the marriage in Bijapur, where all the alleged conspirators had assembled, without waiting for the urgent election duties on 7.5.96, further unusual method of arranging identification parade and immediately asking for acceptance report under section 169 of the Code even after Sumersingh was released on bail on 8.5.96, telephone bills, counter promises from the petitioner's side, recorded telephonic talk on tape, suggest that investigation is heeding towards unfolding a worst type of criminal conspiracy.

On the other hand, in C.R. No. 216/96, police station Palanpur, nothing has been done after 14.5.96 except obtaining of computer photographs. It is their say that on that basis they are searching the man who gave false information on telephone on 30.5.96. I do not understand when admittedly nobody has seen the said informant as information was given on telephone, how the computer photograph of the culprit could be sketched. I have no hesitation in saying that the so-called investigation in C.R.No.216/96 is nothing but a farce.

13. It cannot be lost sight that a conspiracy is always hatched in secrecy and it is impossible to obtain direct evidence of the same. The offenders can be booked on the basis of inference drawn from acts, or illegal omissions of the conspirators in pursuance of a common design. Reference may be given to a case reported in AIR 1980 SC 439.

14. I am informed that investigation in FIR Case No.403/96 is complete and the charge-sheet has been filed and the charges have been framed against one of the accused namely; Phootarmal and further investigation under section 173 (8) of the Code is at an advanced stage. In view of this, there can be no purpose in staying the investigation in this case.

APPLICABILITY OF SECTION 186 OF THE CODE

15. Now I shall deal with the contention on jurisdiction raised on the strength of section 186 of the Code. At the outset, for facility of reference, section 186 is reproduced:

SECTION 186

"High Court to decide, in case of doubt, district where inquiry or trial shall take place

Where two or more Courts have taken cognizance of the same offence and a question arises as to which of them ought to inquire into or try that offence, the question shall be decided-

(a) If the Courts are subordinate to the same High Court, by that High Court;

(b) If the Courts are not subordinate to the same High Court, by the High Court within the local limits of whose appellate criminal jurisdiction the proceedings were first commenced.

and thereupon all other proceedings in respect of that offence shall be discontinued."

From the above provisions it would follow that it enables the High Court to decide the question in case of doubt as to which of the two different courts having taken cognizance of the same offence should inquire or try. The provision is to avoid possible confusion and embarrassment of the two or more Courts. The first requirement to attract the provision is that two different Courts have taken cognizance of the same offence. In case where one Court has taken cognizance and for the same offence the investigation is pending within the local jurisdiction of different Courts, the provisions of section 186 cannot be invoked. The second requirement is that in both the Courts inquiry or the trial is pending. Sub-clause (a) and sub-clause (b) provides as to which Court will take a decision with respect to such doubt. In case both the Courts are subordinate to the same High Court, under clause (a), the decision shall be taken by the same Court. But in a case where the two different Courts are the Courts subordinate to different High Courts, under clause (b), the decision shall be taken by the High Court within the local limits of whose appellate criminal jurisdiction the proceedings first commenced. This provision incorporates a principle of earlier commencement of proceedings to avoid possible confusion or embarrassment.

16. The provision of section 186 does not confer any right on any party. As I have said, this provision

enables the High Court to decide the question out of which two different Courts, the enquiry or trial should proceed. It is significant to notice that the provision provides the consequence of the decision that "thereupon all other proceedings in respect of that offence shall be discontinued". Thus, under section 186, a decision is to be taken on the question which Court will proceed with the enquiry or trial and not the reverse that which Court will not proceed with the enquiry or trial. The consequence of the decision is discontinuance of the proceedings in the different Court or Courts by implication. This is based on the inherent concept of Courts having jurisdiction over a specific territory is essential for the very maintenance of comity of Courts. Section 186 does not empower a High Court to withdraw or issue any direction with respect to an investigation pending in the local criminal jurisdiction of other High Court may be for the same offence. It also does not empower one High Court to decide the competence of any other Court subordinate to other High Courts with respect to the same offence. Section 186 only enables the High Court to remove the doubt in the contingency provided therein by the High Court as provided under sub-section (a) or (b) and as a consequence, proceedings are to be followed as provided under section 186 without any direction to different Court or Courts more particularly in a case of such Courts which are not subordinate to that High Court.

17. Thus in the instant case, this Court lacks jurisdiction to give any direction with respect to withdrawal of investigation in FIR Case No.403/96 with the Rajasthan Police or to withdraw the case from the Court of Special Judge, Jodhpur with respect to the same offence. What i is required to be done by this Court is to see as to whether any Court in the State of Gujarat has taken cognizance of the same offence i.e. offence in FIR Case No.403/96 and C.R. No.216/96 and further if any enquiry or trial is pending in that Court and further that the proceedings of that case has commenced prior to the proceedings in any Court in the State of Rajasthan. There is not a word in either of the two petitions with respect to taking of cognizance by any Court and pendency of enquiry or trial in any Court with respect to the same offence in the State of Gujarat. On the contrary, the specific case of the petitioner in both the petitions is that the investigation with respect to offence under section 58(2) of the NDPS Act is in progress. It is not the case that a police report has been filed and an enquiry or trial is pending in any court and it is only the further investigation under section 173 (8) of the

Code is with the police. Thus, the provisions of section 186 cannot be attracted in the present case.

18. The contentions raised by Mr D N Patel, learned APP, Mr P M Thakkar, learned Advocate, Mr S N Shelat, learned Addl.Advocate General revolves around the consideration of the application under section 169 of the code and the order dated 14.5.96 thereon. While according to Mr Patel, the consideration of report under section 169 is an enquiry and as such cognizance deemed to have been taken. According to Mr Thakkar, order dated 14.5.1996 is an order of discharge under section 227 of the Code. The order of discharge pre-supposes the taking of cognizance. According to Mr Shelat, as soon as the Court applies its mind to the police report and take notice of the offence, cognizance takes place.

19. Thus, the question falls for consideration is

> "whether the Special Judge, Palanpur while considering the report under section 169 of the code in C.R. No.216/96 of police Station Kotwali, Pali, Rajasthan can be said to have taken cognizance of the same offence in FIR Case No.403/96 and enquiry or trial is pending in that Court."

The Criminal Procedure Code is a self-contained Code. Chapter XII provides for the investigation by a police under the heading "Information to the police and their powers to investigate". An investigation usually commence with the information relating to the offence given to the officer incharge of the police station under section 154 of the Code. section 155 provides that if the information is of commission of non-cognizable offence, the police officer will enter the substance of such information in the prescribed register and refer the information to the Magistrate. Section 156 empowers the police to investigate only cognizable offence except on direction by the Magistrate. Sub-section (3) of section 156 provides for any Magistrate empowered under section 190 to order such an investigation. Section 160 to 163 deals with power of the police to record attendance of the witnesses, examine witnesses and record their statements. Section 165 to 166 deals with power of police in the matter of conducting search during investigation. Section 167 pertains to remand. Section 168 provides for report being sent to the officer of a police station about the result of an investigation when such an investigation has been made by subordinate police officer incharge of the police station. Section 169

authorises a police officer to release a person from custody on his executing a bond to appear if and when so required before a Magistrate who is empowered to take cognizance of the offence on police report, in case when it appears to the officer incharge of the police station or the police officer making the investigation that there is no sufficient evidence or reasonable ground of suspicion to justify forwarding of the accused to a Magistrate. Section 170 empowers the officer incharge of the police station, after investigation and if it appears to him that there is sufficient evidence to forward the accused under custody to a competent Magistrate or to take security from the accused for his appearance before the Magistrate in case if the offence is bailable. Section 172 provides for the police diary. Section 173 provides that every investigation under Chapter XII shall be completed without unnecessary delay. As soon as the investigation is complete, the officer incharge of the police station shall forward to a Magistrate empowered to take cognizance of the office on a police report, a report in the form prescribed by the State Government stating the information as required under the said provisions. Sub-section (4) of section 173 provides that whenever it appears from a report forwarded under this section that the accused has been released on his bond, the[Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit. Sub-clause (8) of section 173 provides for further investigation.

20. It is thus, evident that on completion of the investigation, the police is required to submit a report under section 169 or 173 of the Code. Section 169 contemplate submission of a report when investigating officer is not satisfied about the commission of cognizable offence. When the Investigating Officer is not satisfied, constitution of any cognizable offence, the report is popularly known as Final Report which is distinguishable from the charge-sheet under section 173 of the code. The Investigating Officer will submit a Final Report generally requesting for grant of "A", "B" or "C" Summary. When the case of completion of investigation falls within the purview of section 169 whereby meaning that there is no sufficient evidence to justify forwarding of the accused to the Magistrate. The report is to be submitted by the police is termed as "final report". Rule 219 in the Rules and Regulations under Bombay Police Manual requires that such final report should be submitted by the police station incharge through the Superintendent of Police or Sub-Divisional Officer. It provides that while forwarding such final reports, a request should be made to the Magistrate to

classify the case and to issue appropriate Summary of his order. Dealing with provisions of section 169, Vaidialingam, J. in the celebrated judgment in the case of ABHINANDAN JHA V. DINESH MISHRA, reported in AIR 1968 SC 117 observed thus -

> "It will be seen that the Code, as such does not use the expression 'charge-sheet' or 'final report'. But it is understood in the Police Manual containing Rules and Regulations that a report by the police, filed under section 170 of the Code, is referred to as a 'charge-sheet'. But in respect of the reports sent under section 169 i.e. when there is no sufficient evidence to justify the forwarding of the accused to a Magistrate, it is termed variously, in different States, as either "referred charge", "final report" or "Summary".

Section 169 empowers the officer incharge of the police station himself to release the accused on executing a bond in case he does not find sufficient evidence or reasonable ground to forward the accused to the Magistrate. No order is required to be taken from the Court for discharge of the accused under section 169. The bond is taken from the accused for the purpose that if the learned Magistrate at the time of consideration of the police report, feels it necessary to call the said accused, he may do so. While considering the police report under section 173 if there is nothing against the said accused, the Magistrate may pass an order discharging of such bond under Sub-clause (4) of section 173 of the Code.

Chapter XIII provides for jurisdiction of the criminal courts in enquiries and trials. Chapter XIV provides for requisite conditions for initiation of proceedings. Section 190 provides that subject to the provisions of this Chapter, a Magistrate may take cognizance of any offence

> (a) upon receiving a complaint of facts which constitute such offence
>
> (b) upon a police report of such facts
>
> (c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

Chapter XVI deals with enquiry. After the investigation

is over and the cognizance has been taken under Chapter XIV, the subsequent proceedings before the Magistrate before the trial commences is the stage of enquiry which includes supply of documents to the accused, commitment of proceedings etc. This will include consideration of report under section 169 of the Code.

Enquiry is defined in section 2(g) of the Code which means proceedings other than trial conducted under the Code by Magistrate or a Court. Chapter XVII provides for framing of charges. Chapter XVIII under the heading "Trial before the Court of Sessions" provides the procedure of trial before the court of Sessions. A trial begins with opening for prosecution case under section 226. Section 227 provides, if upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers as that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for doing so. It is thus evident that discharge under section 227 is at the stage of trial. Thus, by no stretch of imagination, discharge of bond on application filed by the police under section 169 can be construed as discharge under section 227 of the Code. Thus, it is evident from the scheme of the Code, that section 169 contemplates submission of a report when incharge of the police station is satisfied that there is no sufficient evidence of reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate. He himself has power to release the accused on bond with a direction to appear as and when so required before the Magistrate empowered to take cognizance of the offence on a police report. Section 173 of the Code provides for submission of report on completion of the investigation of the Magistrate. The submission of such report is popularly known as filing of charge-sheet. Under sub-section (3) of section 173, the Magistrate is required to discharge the bond or pass any appropriate order otherwise as he thinks fit in a case where the accused has been released under section 169.

21. The expression "taking cognizance of an offence" has not been defined in the Code as such. But in its broad and ladder sense, it would mean "taking notice of an offence with a view to initiation of judicial proceedings. Thus, whether it is a police report in the form of final report or a charge-sheet or it is a compliant, a cognizance can be taken only on certain facts, which constitute the offence. When a report under section 169 is submitted and the incharge of the police

station is satisfied that no cognizable offence has been committed and the police officer himself asks for acceptance of the final report, the question of cognizance at that stage does not arise. In the present case, on a final report submitted by the police, the same has been accepted by the order of the Special Judge on 14.5.1996 and further order has been made to discharge the bonds submitted in pursuance of the order dated 8.5.1996 releasing Sumersingh on bail. Thus, in the present case, if the police intended to proceed with the investigation for offence under section 58(2) of the NDPS Act, the Police Officer Incharge of the case should have released Sumersingh on bond with direction to appear before a Magistrate empowered to take cognizance of the offence on police report. There was absolutely no occasion to submit police report under section 169 known as 'final report' and to pray for its acceptance. After investigation of the facts constituting offence under section 58 (2) of the NDPS Act, the report could have been submitted under section 173 of the Code and also asking for discharge of bonds given by Sumersingh under section 173 (3) of the Code at that stage. If necessary, police could say for further investigation under section 173 (8) of the Code. Therefore, in my view, no cognizance has been taken of any offence including offence under section 58 (2) of the NDPS Act on the report dated 6.5.1996 under section 169 of the Code. The matter has come to an end on acceptance of the Final Report by the order dated 14.5.1996.

22. It is of course true that the Apex Court in the case of ANIL SARAN v. STATE OF BIHAR, reported in AIR 1996 SC 204, did observe that as soon as the Magistrate applies his judicial mind to the offence stated in the complaint or police report etc., cognizance is said to be taken. Cognizance of the offence takes place when the Magistrate takes judicial notice of the offence. In the said case, the complaint was filed before the Chief Judicial Magistrate, Patna, who after examining the complaint, transferred the case to the Judicial Magistrate II, Patna. The learned Magistrate, examined certain witnesses and then issued process to the accused persons for offence under section 406, 420 IPC. It was contended that the Chief Judicial Magistrate having entertained the complaint was required to examine other witnesses to take cognizance and then could have transferred the case and if so, assigned to a competent Magistrate subordinate to him as envisaged under section 192 (1) of the Code. But without taking cognizance, the Chief Judicial Magistrate committed manifested jurisdictional error in transferring the complaint to the

Magistrate, who took further action therein. The Apex Court found that a Magistrate who receives the case on transfer and takes cognizance would not be incompetent to do so merely because sanction of transfer of the case to his file is not made in accordance with law. The Court further held that the power to take cognizance has been conferred on Magistrate by section 190(1) of the Code and he would not be denuded of his power because the case has come to his file due to some illegal order of the Chief Judicial Magistrate. The Court did not find any jurisdictional error in the order of the Chief Judicial Magistrate taking cognizance of the offence. The Apex Court also observed thus -

"Whether the Magistrate has taken cognizance of an offence on a complaint or on a police report or upon information of a person other than police officer depends upon further (sic) taken pursuant thereto and the attending circumstances of the particular case including the mode in which case is sought to be dealt with or the nature of the action taken by the Magistrate."

In the present case, on a report under section 169, the learned Special Judge, by order dated 14.5.96 accepted the final report and discharged the bond furnished by the accused. There does not appear any action of the Special Judge or any other attending circumstances even from which it can be said that the cognizance has been taken by the learned Judge. Thus, there can be no escape from the conclusion that no Court in the State of Gujarat has taken cognizance of the same offence in C.R. No.403/96 of Kotwali police station, Pali, Rajasthan and in no Court, enquiry or trial is pending. Thus, in my view, no contingency has arisen to decide the question as to which Court ought to enquire or try. The provisions of section 186 are not attracted in the facts and circumstances of the present case.

23. There is substance in the contentions raised by Mr Kela, learned Advocate that these two petitions are not maintainable under Article 226 and 227 as direction is sought under section 186 (b) of the Code, and thus, there is no question of issuing any writ of mandamus or certiorari. Ends of justice would meet if these two petitions are treated as Misc. Criminal Applications under section 186 of the Code without changing the label of Special Criminal Applications'. Thus, both these petitions are treated as Misc.Criminal Applications under section 186 of the Code.

24. After the arguments were concluded, one of the accused, Phootarmal has also filed an application that he may also be heard in the matter. The learned Advocate was asked to argue the matter, but he was not prepared. However, he was asked to submit written submissions. No written submission has yet been submitted. I need not go into the purpose of filing of such application.

25. Before parting with, it may be stated that I have observed that the concerned institutions including the State of Gujarat and the High Court of Gujarat on its administrative side, are passive in cooperating with the investigation in FIR Case No.403/96. simply because highly placed persons are alleged to be involved in the case should not be the reason for any institution to extend unwarranted protection. Law should be allowed to take its own course.

26. In view of the aforesaid, I find no merit in both the petitions being Special Criminal Applications No.1302/97 and 1309/97 and are accordingly dismissed. So far as Special Criminal Application No.1309/97 filed by the State of Gujarat is concerned, the same is dismissed with a cost of Rs.5,000/-. The cost shall be deposited within a period of one month from today. The said amount of cost, on depositing, shall be sent by cheque to Sumersingh, respondent No. 1. The investigation has been delayed at least by two months because of the stay granted by this Court. The matter is under investigation for almost one year. In view of this, it is directed that the investigation shall be completed as expeditiously as possible in any case, latest by 15th January, 1998. All concerned in the State of Gujarat including the State Government, its officers and the High Court of Gujarat shall cooperate with the investigation. Any request by the Investigating Officer to any authority in the State of Gujarat shall be promptly dealt with in accordance with law, but the same shall not be kept pending for more than four days.

Rule in each Special Criminal Applications is discharged. The interim relief stands vacated. As such no order in Misc.Applications No.6163 and 6164 of 1997. Both the Misc.Applications also stand disposed of.

...

FURTHER ORDER

Mr P M Thakkar, learned Sr. Advocate submits that he wants to take the matter in Appeal, and therefore, the operation of this order may be stayed for some time. Considering the facts and circumstances of the case, I do not consider it to be appropriate to stay the order of this Court. The prayer is declined.

4.12.97 [N N Mathur, J]

msp.